in the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1282

GEORGE J. FULTON,

Petitioner,

vs.

DAVID HECHT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, George J. Fulton prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on January 17, 1977.[1]

[1]The Respondents are the general partners in West Flagler Associates, Ltd., a Florida limited partnership. In addition to David Hecht, they are Florence Hecht, Barbara Hecht, Isabel Amdur, and Sidney Lefcourt and Florence Hecht, Melvin Greenberg, Marshall Feuer and Samuel Gordon as personal representatives of the estate of Isadore Hecht.

OPINIONS BELOW

The opinion of the District Court is unreported and is printed in the appendix hereto, *infra*, App. 9. The opinion of the Court of Appeals, printed in the appendix hereto, *infra*, App. 1, is reported in 545 F.2d 540.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1977. Rehearing and rehearing *en banc* were denied on February 14, 1977, App. 15. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

Whether the refusal to renew a longstanding contract with a greyhound kennel owner by a race track, whose primary function is to generate revenue for the state, using a grant of monopoly power from the state and an exemption from its criminal statutes, operated under intense state regulation with the assistance at all times of full time state employees, constitutes state action, where a state agency refused to consider the kennel owner's accusation that his contract was not renewed in retaliation for testimony he gave under subpoena before the agency and that this refusal to renew violated the agency's rules.

Is the protection of 42 USC §1983 limited to blacks in cases in which state action is an issue?

STATUTES INVOLVED

The statutory provision involved is Rev.Stat. §1979, 42 USC §1983 (originally section 1 of the Civil Rights Act of 1871):

§1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

Jurisdiction for Fulton's initial complaint in the Southern District of Florida was based on 28 USC §1332(a)(1) and 28 USC §1343(3). The complaint alleged diversity of citizenship for an action in tort and jurisdiction under 28 USC §1343(3) for the violation of 42 USC §1983. Fulton's second amended complaint added an action under the anti-trust laws, with jurisdiction based upon 28 USC §1337. A non-jury trial was held on the civil rights count and the District Court found state action lacking. Final judgment on this claim was entered under Federal Rule of Civil Procedure 54(b) and appealed to the Fifth Circuit. It is that judgment Fulton requests this Court to review. At other stages in the District Court,

Fulton's tort claim was dismissed for failure to state a claim and final judgment for defendants was entered following jury trial on the anti-trust claims. An appeal from those claims is pending in the Fifth Circuit. The facts on which the state action allegations were based are essentially uncontradicted, although the parties draw vastly different conclusions from them.

George Fulton is a breeder of greyhounds who has raced his dogs in Florida for more than 18 years. Fulton's booking contracts for periods of one to three years were always renewed by Flagler over a fifteen year period. His was consistently among the top kennels at the track. Respondents are the general partners of West Flagler Associates, Ltd., owners and operators of the Flagler Kennel Club.

Monopoly

Flagler is one of three dog tracks licensed by the state to operate in Dade County, Florida. Each of the three tracks has a state granted monopoly over greyhound racing in Dade County for one-third of every year. There is an overlap of approximately two weeks each year when more than one track is running, because of a limitation on the number of days racing is permitted. The most lucrative racing season is during the summer.

Deprivation of Constitutional Right

Flagler and Biscayne Kennel Club, another Dade County dog track, were competing for the summer dates in the 1972-1973 racing season. Biscayne served a state issued subpoena on Fulton compelling him to testify at a

hearing before the State Board of Business Regulation which awarded the racing dates. Fulton's complaint in the District Court alleged that he was threatened with loss of his booking contract if he tesified at the hearing. The complaint also alleges that after his testimony Fulton was told by Flagler's managing partner, Isadore Hecht, that the latter was going to terminate Fulton's booking at Flagler and he would never again race at a track owned by Hecht. The complaint further alleged that Flagler's refusal to renew was in retaliation for Fulton's testimony and to make an example of Fulton by demonstrating that testimony considered adverse by Flagler would result in severe penalties.[2]

Public Function

Flagler and other pari-mutuel establishments are permitted to exist by the Florida Constitution, Aricle VII, §7, and Article X, §7.[3] This system of betting came into existence in Florida in 1931 during the great depression for the purpose of increasing state revenue. That continues to the present day to be the main reason for pari-mutuel wagering in this state. Under the pari-mutuel wagering system, a pari-mutuel pool is created from all bets on each race. Eighty-three percent of the pool is distributed to winning patrons. The race track's gross revenue is the 17% of the

[2]Fulton was not given an opportunity at the state action trial to prove his allegations concerning the reason for the refusal to renew his booking. The trial court did not consider the reasons Fulton was not permitted to continue racing relevant. Flagler's refusal to renew Fulton's booking because of exercise of his first amendment rights is actionable under section 1983 if state action is present. Mt. Healtly Bd. of Education v. Doyle, —— U.S. ——, 50 L.Ed.2d 471 (1977); Perry v. Sindermann, 408 U.S. 593 (1972).

[3]Few so-called "private" businesses are established or authorized by state constitutions.

pool deducted as "commissions". The state's share of every pari-mutuel pool is 7 of the 17% commissions, or 41% of the track's gross revenue.[4] Flagler pays all operating expenses from its 10% of the pari-mutuel pool; this includes 2% of every pari-mutuel pool for purses to the winning greyhounds. The record shows that the state's share of the gross revenues is twice the amount of Flagler's profit from the operation.

Symbiosis

Ten full time employees are at the track all of the time it is in operation and the functions they perform are indispensible to operation of the track. Flagler provides these state employees furnished offices without charge. The state has erected road signs on limited access and other highways to direct the public to Flagler. One of the purposes of heavy state regulation, described *infra*, is to promote public confidence in the integrity of greyhound racing, which enhances both state and track revenue. Based on the sharing of revenue, the factors just mentioned and others described herein, Fulton alleged and proved that the State of Florida is a partner or joint venturer in the operation of Flagler or, alternatively, that Flagler is a revenue generating agency of the state operated for it by the Respondents.

The chairman of the Florida Board of Business Regulation testified at the state action trial about public state-

[4]The state also receives a sales tax on admission tickets or passes and collects winning tickets if a patron forgets. The track receives a subsidy or tax exemption from the state for $170 of its revenue from every race. Fla. Stat. §550.162.

ments he made to the effect that the state and pari-mutuel tracks were in partnership. The state economist testified to the very close inter-relationship between the state and its pari-mutuel permittees. He stated that in Tallahassee, during legislative sessions, there are numerous references to the partnership between the state and the pari-mutuel permittees by legislators, members of the executive branch, agency staff members, and witnesses before legislative committees. "It's a term, the partnership word, has been used for years and years up here." The director of the state's Division of Pari-mutuel Wagering testified that there is a mutually beneficial relationship between the state and the dog track.

Fulton contended below that probably the best illustration of the symbiotic relationship between track and state is found in the joint effort by Flagler and the State of Florida in jailing 18 kennel owners who refused to race at Flagler, at about the time of the trial on the state action issue. This incarceration was upheld by the Florida Supreme Court primarily because of the overwhelming state interest in protecting receipt of $64,000 per day in revenue from Flagler's operation. The Court said that the kennel owners who refused to race were "biting the hand that feeds them"—referring in context to the State of Florida. *Wilson v. Sandstrom*, 317 So.2d 732, 741 (Fla.), *cert. den.*, 423 U.S. 1053 (1975). The opinion amounts to an adjudication by Florida's highest court that the state and Flagler are partners or joint venturers.[5]

[5]That this is an important factor in a state action analysis is established, *inter alia*, by Moose Lodge v. Irvis, 407 U.S. 163, 177 (1972).

Regulation

Flagler has both a long term permit and an annual license from the state. Prior to its issuance, the permit was ratified at a special election by the voters in Dade County. Flagler's general manager described the race track as "the most regulated business in the world." All persons connected with Flagler in any fashion are licensed by the state, including those who scrub the floors and clean the toilets. State statute requires that at least 85% of Flagler's employees be residents of the state for two years. Fla.Stat. §550.27. A state employee at the track investigating any violation of law or rules has the power to authorize other persons to search the person, room, or automobile of any licensee or vendor. Licenses such as Mr. Fulton's may be suspended if the licensee defaults in obligations or issues bad checks. The state judge and two other judges employed by Flagler are responsible for proper conduct of the race meet and have general supervision over owners, trainers, and other officials and licensed personnel. State veterinarians inspect and test greyhounds. State auditors continuously audit all of the fiscal activities of the track while it is in operation, and the state prescribes detailed rules for all fiscal operations of the track. State inspectors inspect the gate count and observe patrons and bettors. They arrange for police officers to eject undesirable patrons.

State Imprimatur by Inaction

A few days after he was informed by letter that Flagler was not going to renew his booking, Fulton requested a meeting with the chairman of the Board of Business Regulation, the director of the Division of Pari-Mutuel Wagering, and Flagler's managing partner, Isadore Hecht. No such meeting took place, and Fulton filed suit. Fulton requested the Board to direct Flagler to permit him to race and also requested an immediate hearing to present charges of rule violation by Flagler. Fulton's letter contended that Flagler's failure to renew his contract was a direct result of his testimony before the Board. A detailed summary of Fulton's letter was orally given to the Board at its next meeting and the Board referred the matter to its staff for review and report at the next meeting. Other than a brief exchange of correspondence, neither the Board of Business Regulation nor the state took any action whatsoever on Fulton's complaint against Flagler.

Fulton complained that Flagler had violated the Board's so-called "15-day rule", section 7E-2.02(21) (b) and (c) of the Rules of the Division of Pari-Mutual Wagering. This prohibts any permit holder or licensee from taking any action, including termination of association, without first giving the licensee and the Division of Pari-Mutuel Wagering a 15-day notice of intent to take such action. It was admitted that no such notice was given to the Board of termination of the 15-year relationship between Fulton and Flagler. The director of the Division of Pari-Mutuel Wagering testified that refusal to rebook a kennel owner who raced at a track for 15 years was a termination of association within the meaning of the 15-day rule, but he did not believe the rule was violated under the circumstances of this case. However, neither the Board of Business Regulation nor any of its officers or employees ever conducted a hearing on Fulton's complaint of rule violation and no order was ever entered on it. That remains the case to this date, some four and one-half years after Fulton's complaint was lodged with the Board. The

record shows that in an unrelated case, the Division of Pari-Mutuel Wagering acted within approximately two weeks on a complaint by a dog track that a number of kennel owners violated the same rule; a hearing was conducted, findings made, and licenses suspended.

Florida dog track owners can deal arbitrarily and unfairly with kennel owners because by custom and usage[6] in this state, the kennel owners have no influence with or remedies available from the Legislature or the Board of Business Regulation in a dispute with a dog track. The tracks wield all of the economic and political power.

REASONS FOR ALLOWANCE OF THE WRIT

1. The decision of the Court of Appeals conflicts with this Court's decisions in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) and *Evans v. Newton*, 382 U.S. 296 (1966). It conflicts with the decisions of the Eighth Circuit in *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972), vacated as moot, 409 U.S. 815 (1972), and the Third Circuit in *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976). This case presents an important question of applicability of section 1983 to white persons who have been subjected to state approved discrimination.

2. *Burton v. Wilmington Parking Authority*, 365 U.S. 714 (1961) is the leading case interpreting the meaning of state action under section 1983. The District Court and the Court of Appeals in this case so limited its significance as to emasculate it in the Fifth Circuit. The trial court decided that application of *Burton* is limited to lessees of public property (App. 11).[7] Both the trial and appellate courts noted an absence in this case of a lease of public property and a physical relationship between Flagler and the state. Both found the mutual financial benefits present not sufficient to amount to state action. The conclusions are erroneous. It was admitted by Respondents that Flagler's permit and license in effect are an exemption to conduct activities that otherwise would be in violation of the state's criminal statutes. This exemption certainly is as valuable and necessary to Flagler as is a lease of public property. It is quite analogous.[8] There are also physical relationships between Flagler and the state, including the full time state employees who help to operate the track and the road signs which assist in bringing the public to Flagler. There is a symbiotic relationship between Flagler and the state. It is based upon the factors just enumerated and an even more traditional partnership analysis. The state receives 41% of the track's revenue. The better business is at Flagler, the more the state benefits. The state will fight in its courts to keep the track

[6]Section 1983: "Every person who, under color of any . . . custom, or usage of any State . . . ." See Adikes v. Kress, 398 U.S. 144 (1970). Flagler takes its power primarily from constitution, statute and regulation, but "custom or usage" also fits this case.

[7]Shortly before the state action trial, the court entered an order finding that *Burton's* reliance on the direct financial benefit to the state is more helpful in determining whether state action exists under the alleged partnership or joint venture in the case at bar. Moose Lodge v. Irvis, 407 U.S. 163 (1972) and Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) were considered not apposite because not predicated on a symbiotic relationship. This position was reversed in the opinion finding no state action (App. 9).

[8]The Eagle Coffee Shop paid $28,700 a year for its lease. Flagler pays many millions annually to the state for its permit. Flagler's permit is probably worth more money than the entire race track.

in operation to protect its revenue, even at the expense of throwing its citizens into jail without jury trial. We have already pointed out that the state effectively participated in Flagler's refusal to renew Fulton's booking by refusing to conduct a hearing and enter an order on Fulton's complaint to the Board that Flagler's action against him violated the state's rules. We juxtapose this Court's language in *Burton*, (365 U.S. at 725) with what we consider to be an appropriate description of the instant facts:

[I]n its lease with Eagle the Authority could have affirmatively r e q u i r e d Eagle to discharge the responsibilities u n d e r the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was in good faith. Certainly the conclu-	[Under its rules, permit and license, the Board of Business Regulation] could have affirmatively r e q u i r e d [Flagler] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws[9] that it was in good

[9]Flagler's action violated Fulton's right to freedom of speech and also deprived him of equal protection of the laws. Fulton was denied the opportunity to compete for the purses, 2% of every pari-mutuel pool established by state constitution, statute, regulation, permit and license, which he depends on for his livelihood.

sions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction. By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which on that account cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.	faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction. By its inaction, the [Board], and through it the State, has not only made itself a party to the refusal [to renew], but has elected to place its power, [permit] and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [Flagler] that it must be recognized as a joint participant in the challenged activity, which on that account cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Even the state's extensive regulation is of mutual benefit to the state and the track. It benefits the state by assuring that it receives its proper share of the revenue. It benefits the track because the extensive state regulation creates an aura of public confidence in greyhound racing which increases the amount of betting and consequently track and state revenue.

3. The Fifth Circuit opinion conflicts with *Evans v. Newton*, 382 U.S. 296 (1966). This Court held that a park devised by will to the City of Macon to be used only by whites had to be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of any change in title. This result was reached because of the predominant public character and purpose of the park. The opinion recites that golf clubs, social centers, luncheon clubs and schools are often racially oriented and private in character. The park was said to be more like a fire department or a police department that traditionally serves the community. What is a dog track? Absent the sharing of revenue and certain other factors, it might very well be put in the private sector. But considering that the primary purpose for its existence is to raise revenue for the state, Flagler in reality serves a public function, using monopoly power, exemption from the criminal laws and other state granted assistance and protection. These factors make it inappropriate to compare the dog track to a public utility as the Fifth Circuit did. If the 18 recalcitrant kennel owners in *Wilson v. Sandstrom*, *supra*, cannot properly be analogized to policemen and firemen, how else is their incarceration to be squared with the Constitution?

4. To our knowledge only one other federal case has analyzed a revenue sharing scheme remotely similar to that in this case. In *Ihrke v. Northern States Power Co.*, 459 F.2d 566 (8th Cir.), vacated as moot, 409 U.S. 815 (1972), the City of St. Paul received 5% of the power company's revenue for gas and electricity sold in the city. The city had the right to approve or even revise the power company's regulations relating to its collection procedures. It gave the power company a monopoly on retail distribu-

tion of gas and electricity. Under the circumstances, its threatened termination of service was found to be under color of law. The revenue sharing scheme made the city to some extent a joint venturer with the power company, according to the analysis of the case by the Third Circuit in *Jackson v. Metropolitan Edison Co.*, 483 F.2d 754, 759 (3d Cir. 1973). *Ihrke* was not directly discussed by this Court in affirming the Third Circuit, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). The instant opinion conflicts with *Ihrke*. We do not believe this Court's opinion in *Jackson*, *supra*, deprived *Ihrke* of its force.[10]

5. In *Hollenbaugh v. Carnegie Free Library*, 545 F.2d 382 (3d Cir. 1976), the Court considered a summary judgment entered on a complaint alleging constitutional deprivation when library trustees terminated appellants' employment. The library received approximately 90% of its financial support from government agencies and 15 of the 24 trustees were appointed by local governments. The library was designated by a local school district and city and as their agent to provide public library service to their residents and taxpayers. The summary judgment was reversed and state action found. The Court focused on the nexus problem, a key one in the Fulton litigation (545 F.2d at 385):

> Under these circumstances, it is impossible to distinguish the state's involvement in the allegedly discriminatory employment determination from

[10]In *Jackson*, this Court noted that "it may well be that acts of heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be 'state' acts than will be the acts of an entity lacking these characteristics." 419 U.S. at 350-51. An additional element in *Ihrke* important to its continued vitality is the sharing of revenue, which was not present in *Jackson*.

the state's involvement in the general operation of the library. That the state's extensive participation in the comprehensive program may obviate a need to show involvement in the specific activity challenged is illustrated by *Burton, supra*, 365 U.S. at 725, 81 S.Ct. 856, 862, finding that state action existed despite the lack of state participation in the formulation of the segregation policy in issue. In the present case, the state's interdependence with the library establishes it as a "joint participant in the challenged activity," *ibid.*, in a "symbiotic relationship" with the library, *Jackson, supra*, 419 U.S. at 357, 95 S.Ct. at 457, making it unnecessary to show specific state participation in the challenged action.

An alleged lack of nexus with the challenged activity was a strong factor in the decisions of both the Court of Appeals and the District Court; they effectively concluded that absent a sufficiently close connection between the state and the challenged action (in this case refusal to renew Fulton's booking) there cannot be state action. The Third Circuit in *Hollenbaugh* and this Court in *Burton* reached a contrary conclusion.[11]

[11]Even if it were assumed *arguendo* that *Burton* itself requires that the state be connected with the challenged action, there is at least as much nexus here as there was in *Burton*. There, the Parking Authority supposedly benefitted by the discriminatory practices of the Eagle Restaurant because this discrimination was thought necessary for the financial success of the restaurant. Here, analogously, Fulton's booking was not renewed, according to Flagler, because he was a troublemaker and did not supply enough dogs with particular racing characteristics. If Flagler's contention were true, getting rid of Fulton would benefit the business financially; eliminating a bad kennel would increase the pari-mutuel pools and the state would derive a financial benefit. Fulton's version is that his booking was not renewed because he permitted himself to be injected into a dispute between two dog tracks for the lucrative summer racing dates, which Flagler lost after having them for several years; this angered Flagler's boss. Flagler's position in the date dispute before the Board of Business Regulation was that it could develop the greatest amount of revenue for the state if it had these dates. Fulton contends Flagler got rid of him because Flagler believed Fulton interfered with a Flagler effort to make more money for the track — and consequently also for the state.

Among the principal defects in the Court of Appeals opinion in *Fulton* are the piecemeal dissection of the individual factors which form part of a state action analysis and a failure to put all of the pieces together to permit examination of the whole. In the vernacular, the Fifth Circuit saw the trees but not the forest. The Court discussed monopoly, regulation, symbotic relationship, state imprimatur by inaction and nexus. It put these factors into such a large-holed sieve that everything fell out but the connection between the state and the challenged action. The other factors taken together are sufficient to demonstrate state action. A more careful analysis of the totality of circumstances is found in the *Hollenbaugh* opinion. *Fulton* conflicts with *Hollenbaugh* and the latter is the better reasoned opinion.

6. This case presents an important question of federal law which needs to be settled by this Court. The question relates to the availability of the remedies provided by 42 USC §1983 to white persons in cases in which state action is an issue. The Fifth Circuit Court of Appeals has become so overburdened by and enmeshed in controversies generated by the effects of the Civil War, it has lost sight of the language and part of the basic purpose of section 1983. That act[12] was passed to protect rights guaranteed by the Fourteenth Amendment because state

[12]Mitchum v. Foster, 407 U.S. 225 (1972) includes an excellent discussion of the history of the act, and its place in our system of federalism.

laws might not be enforced by reason of prejudice, passion, neglect, intolerance or otherwise. *Monroe v. Pape*, 365 U.S. 167 (1961). The protection of this Amendment is not limited to blacks. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36. It is not because there were many blacks in the South that the legislation was necessary, but rather because these human beings were discriminated against and the discrimination not remedied by state law and judicial systems. There is a strong inference in the Fifth Circuit cases that the color of a party's skin is of extreme importance to the outcome of his section 1983 claim. *Greco v. Orange Memorial Hospital Corp.*, 513 F.2d 873, 878 n.9, 879 (5th Cir. 1975); *James v. Pinnix*, 495 F.2d 206, 209 (5th Cir. 1974). *Sub silento*, this was an important factor in the outcome of the instant case. Fulton is white. Even though he was discriminated against by the state's joint venturer and partner and could not find a remedy with the responsible state agency, the District Court and Court of Appeals found him outside the scope of section 1983 protection. This is contrary to the intent and purpose of the statute.

Fulton belongs to a small group encountering problems similar in nature to those of blacks in the reconstruction South. A greyhound kennel owner in a dispute with a dog track does not receive the ear, much less the assistance of the responsible state agency. If he does not perform his agreed task the state and its courts help the dog track to put him in jail.

Justice Douglas perfectly described this case in his dissent in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 363-64 (1974):

> Section 1983 was designed to give citizens a federal forum for civil rights complaints wherever, by direct or indirect actions, a State, acting in cahoots with a private group or through neglect or listless oversight allows a private group to perpetrate an injury. The theory is that in those cozy situations, local politics and the pressure of economic overlords on subservient state agencies make recovery in state courts unlikely.

There are no more influential citizens in the State of Florida than the Respondents in this case. The title "economic overlords" is suitable. There was no remedy for Fulton before the Board of Business Regulation of the State of Florida when he complained that the refusal to renew his contract violated a regulation of that Board. There would likely have been no remedy for Fulton in the courts of the State of Florida. He too would have been told he had bitten the hand that fed him. The power and propensity to corrupt of the racing industry is vast. See, e.g., *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1973), *cert.den.sub.nom. Kerner v. United States*, 417 U.S. 976 (1974).

It is important to the future administration of section 1983 for this Court to make clear that the protection of the statute is available to white citizens who suffer discrimination at the hands of a state or those who take their power from the state.[13]

[13] "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." United States v. Classic, 313 U.S. 325, 326 (1941); Monroe v. Pape, 365 U.S.167, 184 (1961).

CONCLUSION

For the reasons set forth herein, it is respectfully urged that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals,
Fifth Circuit.

No. 75-4122.

George J. FULTON, Plaintiff-Appellant,
v.

Isadore HECHT et al.,
Defendants-Appellees.

Jan. 17, 1977.

Jay M. Vogelson, Dallas, Tex., Norman A. Sand, Paul Siegel, Paul A. Louis, Miami, Fla., for plaintiff-appellant.

Herbert L. Nadeau, Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and TUTTLE and TJOFLAT, Circuit Judges.

JOHN R. BROWN, Chief Judge:

This 54(b) certified appeal of dismissal of a 42 U.S.C.A. § 1983 action is brought by George Fulton, a greyhound breeder and racer, against the partners of West Flagler Associates, Ltd., owners and operators of Flagler Kennel Club, alleging that West Flagler refused to renew his booking contract to race his greyhound dogs at the Kennel Club. The trial court found that the Kennel Club was

privately owned and financed and that the State of Florida's involvement with the dog racing industry was not sufficiently connected with West Flagler's decision to terminate Fulton's contract so as to make West Flagler's conduct attributable to the State for purposes of the Fourteenth Amendment.

Flagler Kennel Club is a wholly privately owned greyhound racing track. It is one of three dog tracks licensed by the State of Florida to engage in the business of parmutuel greyhound racing in Dade County.

George Fulton, a greyhound racer and breeder, was licensed by the State of Florida to race his dogs. He had raced greyhounds at Flagler Kennel Club for approximately fifteen years. His booking contract with West Flagler, to race at the Kennel Club, expired on September 4, 1972 and prior to that date, he was advised that his contract would not be renewed. On September 1, 1972, he filed suit against the partners of West Flagler Associates, Ltd. for failure to renew the contract. He claimed the contract was not renewed in retaliation for testimony he gave before the Board of Business Regulation, the state agency that allocates racing dates among the three Dade County tracks, which was adverse to West Flagler. Fulton asserts that the act of refusing to renew his contract was done under color of state law in violation of § 1983 and in deprivation of his rights under the Fourteenth Amendment. He claims state action is present in that the State regulates the dog racing industry, a symbiotic relationship exists between the State and the Kennel Club, the State has granted a monopoly to the Kennel Club and there is

imprimatur by inaction due to the failure of the Board of Business Regulation to act on his complaint regarding termination of his contract.

Procedural History

In a series of multi-claim complaints,[1] Fulton alleged West Flagler committed an unnamed tort, violated § 1983, the Fourteenth Amendment, and the Sherman Anti-Trust Act in refusing to renew his contract. The trial court dismissed the § 1983 action finding insufficient state involvement. The tort claim was likewise dismissed and trial by jury was subsequently had on the anti-trust claim resulting in judgment against Fulton.[2]

Fulton attempts here to appeal the dismissal of the § 1983 claim and the tort claim. We accept the § 1983 appeal, finding we have jurisdiction, but we must reject the appeal of the dismissal of the tort claim. The trial judge entered a final judgment under F.R.Civ.P. 54(b) on the § 1983 claim. We find no such final judgment on the tort claim. The tort claim is not before the Court since no certificate was entered under 54(b).[3] Having jurisdiction of the § 1983 appeal, we affirm the trial court's dismissal.

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[1]The procedural history of this case can only be characterized as a winding maze of complaints and counts. In addition to the tort claim, anti-trust and § 1983 claim, Fulton alleged numerous other constitutional and statutory violations. However, as pointed out, *infra*, only the § 1983 claim is before us here.

[2]Separate appeal on the anti-trust claim is pending in this Court in case number 76-2391.

[3]We intimate no decision on whether the tort action is to be made a part of the pending anti-trust appeal in case number 76-2391. That is a decision for the panel that is hearing the anti-trust appeal. We are confident that the panel will, within proper limits, permit use of appropriate portions of this record to avoid or reduce unnecessary costs.

State Action

The thrust of Fulton's § 1983 claim is that West Flagler's failure to renew his contract to race his greyhounds at the Flagler Kennel Club track was done under color of state law. He also claims this refusal denied him equal protection of the laws. The Flagler Kennel Club is admittedly a private operation. As such, the proof must show significant state involvement in order to bring an otherwise private concern within the ambit of the Fourteenth Amendment. Moose Lodge No. 107 v. Irvis, 1972, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627; Greco v. Orange Memorial Hospital Corp., 5 Cir., 1975, 513 F.2d 873, cert. denied, 1975, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376. See also Burton v. Wilmington Parking Authority, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; Shelley v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161. The protective armor of the Fourteenth Amendment invoked under § 1983 is activated to prevent deprivation of rights secured by the Constitution and laws only when state action or action taken under color of state laws is present.

We are not left to "flounder blindly" in determining if the state is significantly present on the side of alleged impermissible deprivation of a secured right. The Supreme Court has many times explored this area and exhorted words of wisdom for our guidance. While it would appear that our task has been simplified, we are reminded that "the question of whether particular . . . conduct is private, on the one hand, or . . . 'state action,' on the other hand, frequently admits of no easy answer." Moose Lodge No. 107 v. Irvis, supra, 407 U.S. at 172, 92 S.Ct. at 1971. See also Jackson v. Metropolitan Edison Co., 1974, 419 U.S.

345, 95 S.Ct. 449, 42 L.Ed.2d 477; Burton v. Wilmington Parking Authority, supra, 365 U.S. at 723, 81 S.Ct. 856, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. at 722, 81 S.Ct. at 860.

The Challenged Activity

The trial court found that the State of Florida was not sufficiently connected with West Flagler's refusal to renew Fulton's booking contract so as to imbue that act with the attributes of the State.

Fulton argues that state action or action under color of state law is present in that the State of Florida regulates the dog racing industry. He claims that the State and West Flagler are partners. The State issues a permit and license for the Kennel Club to operate pari-mutuel betting—Fulton, himself, must be licensed by the State to race his dogs—state auditors audit the books of the track, the State receives revenue from the track, state veterinarians examine the racing dogs, and the State performs other functions in the industry that could be considered regulation. These factors considered, however, we are not persuaded that this regulation places the stamp of state created holiness on the Kennel Club. In Jackson v. Metropolitan Edison Co., supra, in speaking of public utility regulation, the Supreme Court said that "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." Id. 419 U.S. at 350, 95 S.Ct. at 453. The Court further said that even extensive or detailed regulation, by itself, would not be sufficient to

tip the scales. The Court, in Jackson, recognized that public utilities would likely be subject to extensive regulation, but it refused to acknowledge such regulation as the single decisive factor for finding the utility to be the state itself[4] We think the dog racing industry can be analogized to the public utility situation. Because of the very nature of the industry, it must be regulated to protect the public. Even though the regulation might be extensive, it cannot, in any realistic sense, make the State a partner in the endeavors of the Kennel Club.

The "symbiotic relationship" that was characterized in Burton v. Wilmington Parking Authority, supra, is not present here. The Kennel Club is not a lessee of public property. There is no evidence of a physical relationship. The State is not obligated to maintain and repair the Kennel Club's premises. There are certain mutual financial benefits that are derived from the operation of the track. Fulton strongly urges that the sharing of the revenue indicates a partnership. He asserts that the Florida Supreme Court case, Wilson v. Sandstrom, 317 So.2d 732 (Fla.1975) illustrates that partnership and the State's interest in protecting its share of the revenue.

In Wilson, the State of Florida intervened in a suit by West Flagler against boycotting greyhound owners to force compliance with their contracts to furnish greyhounds for track racing. The suit resulted in an injunction in effect requiring the dog owners to comply with their contracts to supply the dogs under the pain of contempt for non-compliance. Fulton's position is that intervention by the state to protect its share of the revenue demonstrates

[4]See also Public Utilities Commission v. Pollak, 1952, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068.

that there was a partnership. We do not agree. The financial benefits accruing to the State from the continued operation of the Kennel Club do not convert private conduct into state action.

We must likewise reject Fulton's claim that state action is present because, in addition to the regulation, the Kennel Club is granted a monopoly one-third of the year. Each of the three dog tracks in Dade County is allotted specific dates for racing by the Board of Business Regulation. Dates are set to minimize overlap. Therefore, on some dates, only one dog track would be in operation. Although, it is possibly more likely that we would find the acts of an extensive state regulated business—coupled "with at least something of a governmentally protected monopoly"—"to be 'state' acts than [would] the acts of an entity lacking these characteristics", we cannot let these characteristics lead us to an erroneous conclusion. Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 351, 95 S.Ct. at 453. Our inquiry must go a step further and determine if there is a "sufficiently close [connection] between the State and the challenged action . . . so that the action of the [business entity] may be fairly treated as that of the State itself." Id. See also Moose Lodge No. 107, supra, 407 U.S. at 176, 92 S.Ct. 1965.

The challenged activity here is the refusal to renew Fulton's booking contract to race greyhounds at Flagler Kennel Club. We fail to find that "necessary" sufficiently close connection between this act and the State so as to treat it as the act of the State. The evidence is that the State of Florida—except for the requirement that a dog racer must have a state license to run his dogs—does not regulate booking contracts between the Kennel Club and

the dog owners. In fact, the State has no control over the contract. Fulton has not shown that the State either directly or indirectly participated in the decision not to renew his contract. See Greco v. Orange Memorial Hospital Corp., supra. There has been no showing of involvement by the State of Florida in this challenged activity.

We also agree with the trial court that failure of the Board of Business Regulation to act on Fulton's complaint regarding termination of his contract does not give rise to state action.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 72-1407-CIV-JE

GEORGE J. FULTON,

Plaintiff

vs.

ISADORE HECHT, et al.,

Defendants.

ORDER

THIS CAUSE came on for hearing before the Court on Count II of the second Amended complaint. The issue whether state action exists under Count I was submitted by the parties to the Court for determination prior to jury trial.

Count I alleges a deprivation of plaintiff's civil rights under 42 U.S.C. Sec. 1983. Plaintiff contends that he was deprived of his rights of freedom of speech and equal protection of laws when defendants declined to renew his booking contract to race greyhound dogs at Flagler Kennel Club. Plaintiff argues that the refusal to renew the contract was in retaliation for testimony, which was adverse to defendants' interests, given before the State Board of Business Regulation. The equal protection claim rests on plaintiff's alleged inability to compete on an equal basis for a racing contract. Because of the ruling in this order on the threshold state action issue, the Court will not be

called upon to decide whether defendants' refusal to renew the contract violated plaintiff's constitutional rights.

Where the impetus for the challenged conduct is private, the state must have "significantly" involved "itself" with the activity under scrutiny in order for it to fall within the ambit of the fourteenth amendment. Moose Lodge No. 117 v. Irvis, 407 U.S. 163, 173 (1972). Recently the Supreme Court in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), instructed that the central inquiry should focus on whether there is a sufficiently close nexus between the state and the challenged action of the private defendant so that the defendant's conduct may be treated as that of the state itself. Jackson held that a utility company's termination of service to a household did not constitute state action even though the company was engaged in a business affected with public interest, was subject to extensive state regulation, and enjoyed a partial monopoly within its service territory. Notwithstanding Justice Douglas' dissent in Jackson, this Court recognizes a shift, signaled in both Moose Lodge and Jackson, away from an examination which aggregates the general relationships between the state and a private defendant to an examination which focuses primarily on the state's relation to the challenged action.

State action is present in this action, plaintiff urges, because of state regulation over the dog tracks, because the tracks receive monopoly status, because the tracks are exempt from the state's criminal laws regarding gambling, and because a mutual benefit exists between the tracks and the state through the receipt of revenue from a percentage of the pari-mutuel pools. Plaintiff contends that the result is a maximization of revenue both for the state and the

tracks and this makes the state and the defendants partners in a joint venture for purposes of State action as recognized in Burton v. Wilmington Park Authority, 365 U.S. 714 (1961).

Although neither Moose Lodge nor Jackson involved the "symbiotic relationship" which characterized Burton, the Court in Burton explicity limited its holding to lessees of public property. 365 U.S. at 726. This narrow interpretation was reiterated in Jackson. 419 U.S. at 358. The symbiotic relationship in Burton included both a physical and financial relationship to the extent that the state "had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participation in the enterprise." 419 U.S. at 357-58.

Contrary to the evidence in Burton, there is no evidence in the present action establishing a physical relationship between the state and Flagler Kennel Club. The defendants are not lessees of public property. The Flagler Kennel Club is privately owned and financed. The state is not responsible for the daily maintenance, upkeep, or operation of the track. Certain mutual financial benefits, however, do exist in the present case. Here licenses are granted by the state to the tracks to allow pari-mutuel betting which otherwise would be illegal under state law. The state receives a tax of 7% from the pari-mutuel pool, a sales tax from admission tickets which amounts to either 15% of admission price per patron or 10 cents per person whichever is greater, and the unclaimed or uncashed winnings from the pari-mutuel pools escheat to the state. The state does not share in losses should the tracks lose money. In addition, the evidence is clear and uncontroverted that

the state legitimized pari-mutuel betting at the dog tracks for purposes of creating tourist attractions and to raise revenue.

In addition, plaintiff contends in the present case that state regulation over the tracks creates sufficient state action. State regulation is present here to the extent that employees audit the books of the track, state veterinarians examine all racing dogs, and state supervisors check to prevent off track betting on the premises. State law requires all employees of the track to be licensed by the state. Moreover, in those counties where there are more than one licensed dog track, the state awards racing dates. But Moose Lodge and Jackson caution that the mere fact that a business is subject to state regulation, however, extensive and detailed, does not by itself convert the private conduct into state action 407 U.S. at 176-66; 419 U.S. at 350.

Though mindful of the state regulation and the financial benefits which exist between the state and Flagler Kennel Club, the Court must primarily consider the nexus between the state's involvement with dog tracks and the track's decision not to renew plaintiff's booking contract. See Greco v. Orange Memorial Hospital Corp., No. 74-2102 (5th Cir. May 29, 1975). There is no evidence, as there was in Burton, that benefits occurring to the state are directly attributable to defendants' objectionable activity (the nonrenewal of the contract). There has been no showing that the state's revenues will increase if plaintiff is denied a booking contract or decrease if the plaintiff receives a renewed contract.

Moreover, it has not been established that the state either directly or indirectly participated in the decision not to renew plaintiff's contract. Greco v. Orange Memorial Hospital Corp., supra at 5770. The state does not exercise substantial management functions over the track. The evidence is that the state, through its State Board of Business Regulation, does not regulate the booking contracts between the kennel owners and the dog owners. Furthermore, there is no evidence that the state fostered or encouraged the decision not to renew the contract. See 407 U.S. at 177; 419 U.S. at 358.

The Court does not agree with plaintiff's contention that the failure by the Board to act on a complaint filed by plaintiff with regard to the termination of his contract to race at Flagler constitutes an element of state action. The state's inaction[1] together with the lack of evidence establishing that the state authorized, participated in, or approved the decision to terminate does not give rise to state action in this contest.

The Court concludes, therefore, that the state's involvement with the dog racing industry is not sufficiently connected with defendants' decision to terminate plaintiff's contract so as to make the defendants' conduct attributable to the state for purposes of the fourteenth amendment.

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[1]Plaintiff testified before the State Board of Business Regulation on February 11, 1972. His contract was not renewed on September 5, 1972. A complaint was filed with the Board on September 11, 1972, regarding the contract termination. No formal action has been taken on the complaint pending the outcome of this action. Suit was filed in this Court on September 14, 1972.

IT IS ORDERED and ADJUDGED that Count I of the Second Amended Complaint is hereby dismissed.

DONE and ORDERED at Miami, in the Southern District of Florida this 2 day of July, 1976.

JOE EATON

UNITED STATES DISTRICT JUDGE

cc: Herbert L. Nadeau, Esq.
Sinclair, Louis & Siegel

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

February 14, 1977

TO ALL COUNSEL OF RECORD
NO. 75-4122—George J. Fulton v. Isadore Hecht, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
Clerk

Susan M. Gravois

Deputy Clerk

/smg

cc: Mr. Jay M. Vogelson
Mr. Paul Siegel
Mr. Herbert L. Nadeau

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1282

GEORGE J. FULTON,
Petitioner,

vs.

ISADORE HECHT, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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RESPONDENTS' RE-STATEMENT OF THE CASE

Petitioner's statement of the case is not a statement of the case but is basically an argument. The collateral matters so advanced violate the express admonitions of Rule 23.4 of this Court.

The decision of the Fifth Circuit sought to be reviewed, *Fulton* v. *Hecht*, (CCA 5 1977) 545 F.2d 540, clearly sets forth the history of the case, the issues and the facts.

However, Petitioner's argumentative statement of the case dictates a restatement in order to answer the arguments advanced ad seriatim.

First is the contention that:

> "* * * Fulton alleged and proved that the State of Florida is a partner or joint venturer in the operation of Flagler or, alternatively, that Flagler is a revenue generating agency of the state operated for it by the Respondents."

The above statement is contrary to the findings of both lower courts. The record clearly establishes that the State of Florida exercises no control over the operation or management of the track. Flagler as a privately owned operation pays all of the expenses, establishes its own policies, determines the services to be afforded its patrons and the types and classes of races to be run.

The State of Florida participates in the pari-mutuel pool to the degree provided for by statute, but it is not required to share in any losses. Mutuality of control and an agreement for the sharing of losses are essential to the existence of a joint venture or partnership. *Livingston* v. *Twyman,* (Fla. 1950) 43 So.2d 354, *Kislak* v. *Kreedian,* (Fla. 1957) 95 So.2d 510.

The supervision and regulation by the State of Florida has but one objective to oversee, check and audit the pari-mutuel handle to insure that the state received its prescribed share. The remaining regulations are designed to maintain the public confidence in the integrity of dog racing.

The next contention for the existence of a partnership is based upon the testimony of the Chairman of the Board of Business Regulations that he had upon occasion referred to the pari-mutuel tracks in Florida as a partnership. Reliance is then placed upon the testimony of a state economist to the effect that legislators, members of the executive department and others used the term partnership in discussing the relationship between the pari-mutuel tracks and the State. This same witness also testified that he did *not* share that view.

Petitioner then relies upon the opinion of the Supreme Court of Florida in *Wilson* v. *Sandstrom,* (Fla.) 317 So.2d 732, 741, *Cert. Denied,* (1975) 423 U.S. 1053 as amounting to an adjudication that the State and the pari-mutuel tracks are partners or joint venturers. This simply is not the case as an examination of that opinion will readily disclose. The dog track and the State are no more partners or joint venturers than a gambling house operator running a poker game is a partner or joint adventurer with his patrons when he cuts the pot.

Petitioner then complains that the State refused to follow its so-called 15 day rule, which requires the giving of 15 days notice to it permittees or licensees of cancellation of their license. The rule obviously applies only to the holders of licenses from the State to operate a pari-mutuel establishment. It does not apply to kennel owners or to private contracts.

Furthermore the Division Director of the Department of Business Regulations testified that the rule was applicable only when great harm would result to the public welfare. He was also of the opinion that the unilateral refusal by West Flagler to rebook Fulton did not violate the rule because the State had no interest in whether Fulton was running his dogs at Flagler or not.

The gravamen of Fulton's complaint is Flagler's election not to renew his booking contract. The lower courts found and it is conceded that the State exercises no supervision, authority or control over such contracts. The "State Action" doctrine has no application, absent control and

authority over the subject matter of the complaint. See: 14 *C.J.S.*, (Civil Rights) Supp. 193, 195, Sections 115, 117 and authorities cited. *Greco* v. *Orange Memorial Hospital Corporation, et al.*, (CCA 5 1975) 513 F.2d 873, *Cert. Denied*, (1975) 423 U.S. 1000.

The opinion of the Fifth Circuit sought to be reviewed clearly and succinctly states the facts and the issue. The Court said (text 541):

> "The thrust of Fulton's §1983 claim is that West Flagler's failure to renew his contract to race his greyhounds at the Flagler Kennel Club track was done under color of state law. He also claims this refusal denied him equal protection of the laws. The Flagler Kennel Club is admittedly a private operation. As such, the proof must show significant state involvement in order to bring an otherwise private concern within the ambit of the Fourteenth Amendment. *Moose Lodge No. 107* v. *Irvis*, 1972, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627; *Greco* v. *Orange Memorial Hospital Corp.*, 5 Cir., 1975, 513 F.2d 873, *cert. denied*, 1975, 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376, See also *Burton* v. *Wilmington Parking Authority*, 1961, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45; *Shelley* v. *Kraemer*, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161."

The Court of Appeals in its opinion (text 543) expressly held that the State does not regulate the booking contracts between the kennel club and the dog owners. This is admitted by Petitioner.[1]

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1. In their brief in the anti-trust aspect of this case still pending in the court below *Fulton* v. *Hecht*, (CCA 5) Case No. 76-2391 petitioners say:

> "Except for licensing dog owners, the Florida Board of Business Regulation does not regulate the booking system."

REASONS FOR DENYING THE PETITION

Without diminishing the importance of any appellate decision involving constitutional or alleged constitutional rights, the court below did no more than follow the instructions of this Court in *Burton* v. *Wilmington Parking Authority* (1961) 365 U.S. 715, *Moose Lodge No. 107* v. *Irvis*, (1972) 407 U.S. 163, and *Jackson* v. *Metropolitan Edison Co.*, (1974) 419 U.S. 345, by sifting the undisputed facts and weighing the circumstances from which it reached the unanimous legal and factual conclusion that the required significant involvement with discrimination on the part of the state was lacking. *Reitman* v. *Mulkey*, (1967) 387 U.S. 369.

Flagler's decision not to renew Fulton's booking contract, can hardly be said to constitute a question of particular gravity or general importance, so as to justify the issuance of the writ. *Rudolph* v. *U. S.*, (1962) 370 U.S. 269.

In quoting from *Burton* v. *Wilmington Parking Authority*, (1961) 365 U.S. 715 at 723 the Fifth Circuit in affirming the District Court in the instant case said:

> "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." 365 U.S. at 722, 81 S.Ct. at 860.

Following the above quotation the court continued:

> *"The Challenged Activity*
>
> The trial court found that the State of Florida was not sufficiently connected with West Flagler's refusal to renew Fulton's booking contract so as to imbue that act with the attributes of the State."

The Court of Appeals on the record reached the same conclusion and unanimously affirmed. Under such circumstances this court will not review by certiorari the findings and decisions of the lower courts. *Golden State Bottling Co., Inc.* v. *N.L.R.B.*, (1973) 414 U.S. 871, *U. S.* v. *Durham Lumber Co.*, (1960) 363 U.S. 522.

Denial of certiorari by this court in other cases on the same issue under like circumstances dictates a like denial in the instant case.

In *Golden* v. *Biscayne Bay Yacht Club et al.*, (CCA 5 1976) 530 F.2d 16 one black and one member of the Jewish religion brought a civil rights action against the private yacht club which held a lease from the City for use of bay bottom lands on which the club docks were constructed. Their complaint was that they were excluded from membership because of their color or religion. The District Court ordered the club to stop barring applicants for membership upon the grounds stated. The Court of Appeals affirmed 521 F.2d 344. On rehearing en banc the Court of Appeals reversed. Five circuit judges dissented.

The plaintiffs filed a petition for certiorari to this court. That petition was denied (November 1976) ..... U.S. ....., 50 L.Ed.2d 152.

The *Golden* case presented more compelling features for the granting of the petition than are present in the instant case. (1) five judges dissented, (2) the case had racial and religious overtones, and (3) public lands under lease were involved. None of these elements are present in the instant case.

In *Greco* v. *Orange Memorial Hospital Corporation, et al.*, (CCA 5 1975) 513 F.2d 873 which is closely in point the Court likewise found State action to be lacking. This Court there denied certiorari. (1975) 423 U.S. 1000.

THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS RELIED UPON BY THE PETITIONER

Petitioner grounds its petition upon the contention that the decision of the Court of Appeals conflicts with this Court's decisions in *Burton* v. *Wilmington Parking Authority*, (1961) 365 U.S. 715 and *Evans* v. *Newton*, (1966) 382 U.S. 296. It is also contended that the decision conflicts with *Ihrke* v. *Northern States Power Company*, (CCA 8 1972) 459 F.2d 566 and *Hollenbaugh* v. *Carnegie Free Library*, (CCA 3 1976) 545 F.2d 382.

It is then asserted that the instant case presents an important question as to the applicability of 42 *U.S.C.* §1983 to white persons "who have been subjected to state approved discrimination".

There is no State approved discrimination anywhere involved in Flagler's refusal to renew Petitioner's booking contract. Both lower courts so found and Petitioner in its anti-trust brief admits that the State does not undertake to regulate the booking contracts.[2] It was simply a private decision by a private corporation in a private matter wholly unconnected with any concept of State action.

In affirming the District Court's finding that no State action existed the Fifth Circuit in the instant case discussed *Jackson* v. *Metropolitan Edison Co.*, (1974) 419 U.S. 345 as well as the *Burton* case, saying:

> "In *Jackson* v. *Metropolitan Edison Co.*, *supra*, in speaking of public utility regulation, the Supreme Court said that '[t]he mere fact that a business is subject to state regulation does not by itself convert its ac-

2. Footnote one, *supra*.

tion into that of the State for purposes of the Fourteenth Amendment.' *Id.* 419 U.S. at 350, 95 S.Ct. at 453. The Court further said that even extensive or detailed regulation, by itself, would not be sufficient to tip the scales. The Court, in *Jackson,* recognized that public utilities would likely be subject to extensive regulation, but it refused to acknowledge such regulation as the single decisive factor for finding the utility to be the state itself. We think the dog racing industry can be analogized to the public utility situation. Because of the very nature of the industry, it must be regulated to protect the public. Even though the regulation might be extensive, it cannot, in any *realistic sense,* make the State a partner in the endeavors of the Kennel Club.

> The 'symbiotic relationship' that was characterized in *Burton* v. *Wilmington Parking Authority, supra,* is not present here. The Kennel Club is not a lessee of public property. There is no evidence of a physical relationship. The State is not obligated to maintain and repair the Kennel Club's premises."

With respect to *Burton,* the Petitioner then juxtaposes the language in *Burton* with what it considers to be "* * * an appropriate description of the instant facts * * *". This transposition is easily accomplished with any case when you start with a false premise. Petitioner in advancing this comparison says "* * * but no state may effectively abdicate its responsibilities by ignoring them or merely failing to discharge them whatever the motive may be." Petitioner assumes as its false premise, without proof, that the State had some responsibility or duty imposed by law with respect to the booking contracts. The record is wholly to the contrary as both lower courts so found.

With respect to *Jackson* which was subsequent to *Burton* the Court said:

> "*Jackson* v. *Metropolitan Edison Co., supra,* 419 U.S. at 351, 95 S.Ct. at 453. Our inquiry must go a step further and determine if there is a 'sufficient close [connection] between the State and the challenged action . . . so that the action of the [business entity] may be fairly treated as that of the State itself.' *Id.* See also *Moose Lodge No. 107, supra,* 407 U.S. at 176, 92 S.Ct. 1965.
>
> The challenged activity here is the refusal to renew Fulton's booking contract to race greyhounds at Flagler Kennel Club. We fail to find that 'necessary' sufficiently close connection between this act and the State so as to treat it as the act of the State. The evidence is that the State of Florida—except for the requirement that a dog racer must have a state license to run his dogs—does not regulate booking contracts between the Kennel Club and the dog owners. In fact, the State has no control over the contract. Fulton has not shown that the State either directly or indirectly participated in the decision not to renew his contract. See *Greco* v. *Orange Memorial Hospital Corp., supra.*"

Evans v. *Newton,* (1966) 382 U.S. 296, is no wise in point. It was there held that a public park devised by Will to the City of Macon upon condition that it only be used by whites and managed by white trustees could not be so restricted. The court held that the property had to be treated as a public institution and it was improper to exclude blacks from the use of the park under the Fourteenth Amendment.

Justice Black dissented upon the ground that no error was committed under Georgia law in accepting the City's resignation as trustee and appointing a successor trustee. He also was of the view that the writ was improvidently granted in the first instance. Justices Harlan and Stewart agreed with Black, J., saying:

> "In my view the writ should be dismissed as improvidently granted because the far-reaching constitutional question tendered is not presented by this record with sufficient clarity to require or justify its adjudication, assuming that the question is presented at all."

Ihrke v. *Northern States Power Company,* (8th Cir. 1972) 459 F.2d 566, has no bearing on the instant case because there the Court of Appeals in reversing simply held that the complaint stated a cause of action. That case challenged the constitutionality of regulations promulgated by the utility relating to the termination of service. It was claimed that the service had been terminated without notice and without a hearing.

A decision on the merits after a trial, as in the case at bar, is a far cry from a decision simply holding that the complaint failed to state a cause of action.

Petitioner further admits that the opinion and decision in the *Ihrke* case was vacated as moot (1972) 409 U.S. 815. This Court in vacating the opinion of the Eighth Circuit said "* * * judgment vacated and the case remanded to the Court of Appeals with instructions to dismiss the case as moot."

In face of the instruction to dismiss the case it is difficult to see upon what basis Petitioner can now cite the decision for a claimed conflict. Reliance upon the *Ihrke* decision can only be classified as an academic exercise and it is not the function of this Court on certiorari to decide academic questions.

Lastly Petitioner for a claimed conflict relies upon *Hollenbaugh* v. *Carnegie Free Library,* (CCA 3 1976) 545 F.2d 382. By no stretch of the imagination can the instant case be considered as being in conflict with *Hollenbaugh.* The opinion shows that the library received approximately 90% of its financial support from local municipalities, school districts and the Commonwealth of Pennsylvania. It was governed by 24 trustees, 15 of whom would be appointed by local government concurrent with their terms of office in the appointing local government bodies. The District Court there found as a matter of law that the requisite State involvement was lacking and entered summary judgment without ever reaching the merits of the complaint. The Third Circuit in reversing simply held that the nexus test was one of degree and "* * * within the confines of certain guidelines the presence or absence of state action must be determined on a case by case basis".

The decision of the Fifth Circuit Court of Appeals in the instant case affirming the findings of fact and conclusions of law made by the District Court is well within the judicial guidelines for a decision of such issues as expressed in the decisions of this Court.

THE DECISION BELOW REPRESENTS NEITHER IMPORTANT NOR UNIQUE CONSTITUTIONAL ISSUES

The decision below is important only to the litigants involved. The petition is but an attempt to extend federal jurisdiction over private contracts between private parties unconnected with any State regulation of such contracts. Such efforts do not create or give birth to an "important" constitutional issue.

The Director of Business Regulations testified that the State of Florida had no interest one way or the other in whether or not Fulton had a booking contract or raced his dogs at Flagler. The refusal of Flagler to renew Fulton's booking contract cannot be characterized as presenting special or important issues of constitutional law so as to warrant the granting of a petition for certiorari on the basis of a claimed conflict.

CONCLUSION

For the reasons set forth above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that two (2) copies of the foregoing printed Respondents' Brief in Opposition to Petition for Writ of Certiorari to United States Court of Appeals, Fifth Circuit were mailed to Sinclair, Louis & Segal, 1600 duPont Building, Miami, Florida 33131, and J. Vogelson, Esq., 2200 Fidelity Union Tower, Dallas, Texas 75201, Attorneys for Petitioner this ..... day of April, 1977.

HERBERT L. NADEAU